

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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MICHAEL J. FLYNN, *et al.*,

Case No. 3:19-cv-00239-MMD-CLB

Plaintiffs,

ORDER

v.

MICHAEL LOVE, *et al.*,

Defendants.

I. SUMMARY

On March 30, 2021, the Court granted in part and denied in part Defendants' previous motion to dismiss, and gave Plaintiffs Michael Flynn and Philip Stillman (together, "Plaintiffs") leave to amend their dismissed claims. (ECF No. 120.) Thereafter, Plaintiffs filed a fourth amended complaint (ECF No. 121 ("FAC")) against Defendants Michael and Jacquelyne Love, Meleco, Inc., and Trustee Michael Love of the Michael Love E. Family Trust (collectively, "Defendants").

Before the Court now is Plaintiffs' motion to strike a notice filed by Michael Love ("Love") rejecting a non-binding arbitration award and Love's request for a trial *de novo* following arbitration proceedings that took place in California. (ECF No. 122.) Plaintiffs also move for a speedy hearing on their seventh cause of action for declaratory judgment. (ECF No. 143.) Additionally, Defendants move to both partially dismiss claims and to strike various parts of Plaintiffs' FAC. (ECF Nos. 124, 125.) As further discussed below, the Court will grant Defendants' motion to partially dismiss the FAC, deny both parties' motions to strike, and deny Plaintiffs' motion for a speedy hearing.

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II. BACKGROUND

This action arises from contractual disputes pertaining to a settlement involving the copyrights of 35 songs and events surrounding these songs dating back to the 1960s. As mentioned above, the Court previously issued an order on March 30, 2021. (ECF No. 120.) In that order, the Court denied Plaintiffs' previous motion for summary judgment on their seventh cause of action in their third amended complaint ("TAC") seeking declaratory judgment. (*Id.*) The Court found that a genuine issue of material fact exists as to whether there was a fully executed agreement between the parties. (*Id.* at 12-14.) Additionally, the Court granted in part and denied in part Defendants' previous motion to dismiss, and granted Plaintiffs leave to amend their TAC. (*Id.* at 14-22.) Plaintiffs have since filed their FAC. (ECF No. 121.) The following facts are taken from Plaintiffs' FAC,¹ unless noted otherwise.

In November 1961, the Beach Boys music group was formed and included Love and Brian Wilson ("Wilson") as members. (*Id.* at 23.) Wilson's father, Murry Wilson, was the Beach Boys' manager and took control of the copyrights and publishing of the group's songs. (*Id.*) Between 1961 and 1964, Love and Wilson co-wrote many of the Beach Boys' songs and albums. (*Id.*) However, Love was not given songwriting credits on the copyright applications of these songs. (*Id.*)

In 1967, Abraham Somer became attorney for both the Beach Boys and Murry Wilson. (*Id.*) Somer incorporated the Beach Boys as Brother Records, Inc., and made Murry Wilson sole proprietor of Sea of Tunes, Inc., which held the copyrights and publishing rights to the Beach Boys' songs. (*Id.*) In 1969, Sea of Tunes, Inc. was sold to Almo Irving Music (the "1969 Sale") with Somer representing the parties, along with

¹Similar to Plaintiffs' TAC (ECF No. 50), the allegations in the 71-page FAC relate to numerous events and individuals spanning six decades. (See ECF No. 120 at 2, n.4.) Because of the style and manner in which the FAC is written, and the Court's difficulties in comprehending the allegations at times, Plaintiffs' claims require the Court to construe facts as stated herein.

Additionally, the Court notes that much of the factual allegations in the FAC remain identical to that of the TAC. (See ECF No. 50.)

1 Brother Records, Inc., and Beach Boys' members. (*Id.*) At the time, Somer's conflict of
2 interest was allegedly concealed, Wilson was mentally incompetent, and Love received
3 nothing from the 1969 Sale. (*Id.* at 23-24.)

4 Around 1985, Somer's conflict of interest was discussed at Brother Records'
5 board meetings. (*Id.* at 24.) An investigation into the matter was conducted from 1985 to
6 1986 by attorneys John Branca and James Tierney, and by Eugene Landy. (*Id.*)
7 Additionally, members of the Beach Boys and others were involved in the investigation
8 and corresponded with Branca. (*Id.* at 24-25.) Plaintiffs allege that there are documents
9 and correspondences during this period regarding the investigation and its purpose. (*Id.*
10 at 25.)

11 Attorney Tierney met with Love on December 5, 1986, and they entered into a
12 written agreement on December 22, 1986, securing Love's cooperation in a lawsuit
13 Wilson was pursuing to regain copyrights of the Beach Boys' songs. (*Id.* at 25-26.) For
14 his cooperation, Love would receive "30% of the [Wilson] case recovery, restoration of
15 [Love's] songwriting credit and copyrights and a minimum of \$2 million for past unpaid
16 songwriting payments that had been paid to [Wilson]." (*Id.* at 26.) Nearly three years
17 later in August 1989, Wilson filed a lawsuit against Almo Irving Music, Somer, and
18 Somer's law firm, to regain copyrights to the Beach Boys' songs ("Wilson Case").² (*Id.* at
19 26-27.) In the Wilson Case, Wilson argued the defendants concealed Somer's conflict of
20 interest from the date of the 1969 Sale until the fall of 1988, and additionally argued that
21 Wilson was legally incompetent. (*Id.*)

22 **A. The 1992 Agreement**

23 Love and Jacquelyne Love (together, the "Loves") met Michael Flynn ("Flynn") in
24 December 1991. (*Id.* at 29-30.) Jacquelyne Love ("Jacquelyne") disclosed to Flynn the
25 legal claims she believed Love had in numerous Beach Boys songs he co-authored with
26 Wilson, and the ongoing Wilson Case at the time. (*Id.*) She further disclosed that there

27
28 ²The Wilson Case was eventually settled in favor of Wilson for \$10 million and he
forfeited recovery of the copyrights. (*Id.* at 34.)

1 was no written agreement evidencing a promise of what Love was to receive from the
2 Wilson Case. (*Id.* at 30.)

3 From January to July 1992, Plaintiffs investigated the Wilson Case. (*Id.* at 30-31.)
4 Plaintiffs informed the Loves that Somer's conflict of interest in the 1969 Sale was the
5 basis to defeat the statute of limitations issue in the Wilson Case. (*Id.* at 31.) At the time,
6 California had a one-year statute of limitations to sue Somer and his law firm. (*Id.*)
7 Plaintiffs allege that, at the time, the Loves knew about the statute of limitations and
8 about the conflict of interest. (*Id.*)

9 Plaintiffs thereafter entered into an agreement with Love to pursue Love's claims
10 to the copyright of the Beach Boys' songs on July 27, 1992 ("1992 Agreement"). (*Id.* at
11 33.) Under the 1992 Agreement, Plaintiffs agreed to pursue Love's case on a sliding
12 scale contingent fee agreement with an expense retainer to be replenished when it fell
13 below \$7,000. (*Id.*) When the Agreement was made, Jacquelyne stated that all financial
14 matters, documents production, and related questions should go to her. (*Id.*) The
15 Agreement was mutually swapped in the mail with cover letters signed by Love and
16 Flynn, and a copy of the Agreement with only Love's signature was sent months later to
17 The Ashley Firm, a certified public accountant firm. (*Id.*) Additionally, a second signed
18 copy of the Agreement occurred at a Beach Boys rehearsal. (*Id.*)

19 From July 1992 until February 1995, Plaintiffs represented Love in a lawsuit
20 against Almo Irving Music and Wilson ("Love Case"). (*Id.* at 33-34.) During this time,
21 Plaintiffs met with Tierney and Little, who refused to acknowledge any agreement with
22 Love or that Love co-authored 35 Beach Boys songs. (*Id.* at 34.) Tierney and Little
23 claimed then that they spoke to the Loves about the statute of limitations issue in the
24 Love Case prior to Love's deposition in the Wilson Case in March of 1991. (*Id.*)

25 **B. The 1993 Agreement**

26 Beginning around January 1993, the expense retainer pursuant to the 1992
27 Agreement was not being replenished and defaulted. (*Id.* at 35.) Flynn borrowed
28 \$200,000 to maintain the Love Case. (*Id.*) In September 1993, Almo Irving Music

1 offered to settle Love's claims. (*Id.*) However, conflict and disagreement arose between
2 the Loves. (*Id.* at 35-36.) Jacquelyne had intentions to obtain the settlement money to
3 remodel the Love's property and to get married. (*Id.*) Flynn thus prepared an agreement
4 ("1993 Agreement") between him and Love. (*Id.* at 36.) The Agreement provided that
5 Plaintiffs would "'own' 30% of [Love's] rights and income in the songs recovered" and
6 Plaintiffs would pay the expenses from the Love Case. (*Id.* at 36-37.) Jacquelyne gave
7 Flynn a fully executed 1993 Agreement. (*Id.* at 36.) Love, who was present, said nothing
8 about the signature on the Agreement. (*Id.*) The Loves married in April 1994. (*Id.* at 37.)

9 **C. The 1994 Agreement**

10 On December 12, 1994, a jury return a special verdict in favor of Love. (*Id.* at 38.)
11 Plaintiffs and the Loves engaged in discussions after the verdict. (*Id.*) Jacquelyne took a
12 lead in the discussions and control of the decision making. (*Id.*) She and Plaintiffs
13 agreed that Plaintiffs were to be paid 30% of all fees on songwriting royalties going
14 forward plus 30% of the cash portion of the settlement. (*Id.* at 39.) She produced to
15 Plaintiffs the signed 1994 Agreement ("1994 Agreement") in the presence of Love. (*Id.*)

16 **D. Following the Agreements**

17 Between 1995 to 1999, Plaintiffs' law firm represented Love on several matters
18 and Flynn routinely consulted Love on non-litigation matters. (*Id.*) From 1995 to 2017,
19 the Loves provided accounting on a regular basis on the royalties and other income
20 received from the 35 Songs. (*Id.* at 63.) Jacquelyne controlled and paid Plaintiffs
21 quarterly their 30% contingent fee but this amount is alleged to be inaccurate. (*Id.* at
22 17.) Over the past 25 years, Jacquelyne diverted money owed to Plaintiffs over to the
23 Michael Love E. Family Trust. (*Id.* at 44.) Additionally, sometime between 2011 to 2012,
24 Jacquelyne requested old files in the Love Case, and Flynn complied by turning "over
25 virtually all of his files." (*Id.* at 40.) This included the original fee agreement files. (*Id.* at
26 41.)

27 In early 2017, Love called Flynn and stated, "[Jacquelyne] cheated you and your
28 partners on royalties." (*Id.* at 42-43.) Between March and April 2017, Love told Flynn the

1 following: Jacquelyne demanded 50% (community interest) of money from the songs,
 2 she cheated Flynn with regard to BMI income, switched BMI to ASCAP and took a
 3 million dollars on a three-year contract without paying Flynn and his partners, she failed
 4 to pay them on time by holding checks, she was seeking to get \$2.5 million from music
 5 publishing company BMG on upcoming copyright reversions by selling the songwriter
 6 royalties. (*Id.* at 43.) In April 2017, Plaintiffs were denied approximately \$200,000 when
 7 the Loves “switched from BMI to ASCAP with three advance annual payments of
 8 \$333,000, of which two had been paid in the amount of \$666,000” to Defendants. (*Id.* at
 9 18.) In May 2017, Jacquelyne stated to Flynn that she “would never have allowed Mike
 10 Love to agree to the 30% of the gross recovery required by the fee agreements” and the
 11 “fee agreements should have stopped after 7 years.” (*Id.* at 47.) She further stated that
 12 “Love never signed the 30% agreement.” (*Id.*)

13 Plaintiffs’ TAC sets forth nine causes of actions, but three are relevant to this
 14 order. (*Id.* at 53-70.) Plaintiffs’ first cause of action is fraud, alleging that Defendants
 15 engaged in a “pattern of fraud” that directly caused Plaintiffs to enter into the three
 16 Agreements. (*Id.* at 53-62.) The seventh cause of action seeks a declaratory judgment
 17 against the Loves regarding the validity and enforceability of the three Agreements. (*Id.*
 18 at 67-69.) The eighth cause of action alleges fraudulent transfer by the Loves. (*Id.* at
 19 69.) As a result of Defendants’ actions, Plaintiffs allege that they have been damaged in
 20 the amount of at least \$32 million and seek punitive damages in excess of \$52.5 million.
 21 (*Id.* at 62.) As set forth in paragraph 8 of the relief sought, Plaintiffs’ prayers for relief
 22 include striking Defendants’ rejection of the arbitration award, enter judgment on the
 23 validity of the 1992 Agreement, and conduct a damages hearing or trial. (*Id.* at 71.)

24 **E. Arbitration**

25 Further relevant to this order, Plaintiffs filed an application for arbitration with the
 26 San Diego County Bar Association (“SDCBA”) on May 14, 2019. (ECF No. 108-1.) The
 27 non-binding five-day arbitration hearing before a panel of arbitrators took place in
 28 October 2020. (*Id.*) On February 1, 2021, the panel issued a Fee Arbitration Findings

1 and Award (“arbitration award”). (*Id.*) Love rejected the arbitration award and filed with
 2 this Court his notice of rejection of the arbitration award and a request for a trial *de*
 3 *novo*, citing California Business and Professions Code (“Cal. Bus. & Prof. Code”) §
 4 6204(b). (ECF No. 108.)

5 **III. DISCUSSION**

6 Because there are several pending motions, the Court will begin by addressing
 7 Defendants’ motion to partially dismiss the FAC and will grant the motion, therefore
 8 dismissing Plaintiffs’ fraud and fraudulent transfer claims. The Court will then address
 9 Defendants’ motion to strike portions of the FAC, followed by Plaintiffs’ motion to strike
 10 Love’s rejection of the arbitration award. The Court will deny both parties’ strike motions
 11 for reasons discussed below. The Court will conclude by addressing Plaintiffs’ motion
 12 for a speedy hearing on their seventh cause of action and will deny the request because
 13 the Court has previously addressed this issue.

14 **A. Defendants’ Motion to Partially Dismiss³**

15 Defendants argue their motion to partially dismiss claims in the FAC should be
 16 granted under Local Rule 7-2(d) because Plaintiffs’ opposition to their motion was
 17 untimely. (ECF No. 135 at 3-4.) Defendants additionally argue Plaintiffs’ fraud and
 18 fraudulent transfer claims should be dismissed under Federal Rules of Civil Procedure
 19 12(b)(6). (ECF No. 124 at 8-12.) While the Court agrees with Defendants that Plaintiffs’
 20 opposition is untimely, thus constituting consent to Defendants’ motion under LR 7-2(d),
 21 in the interest of resolving the issues on the merits, and in exercising its inherent
 22 authority to manage its docket, the Court declines to grant Defendants’ motion on this
 23 basis.⁴ Because Plaintiffs have requested the Court dismiss their fraudulent transfer
 24

25 ³The Court has reviewed Plaintiffs’ response and Defendants’ reply. (ECF Nos.
 26 132, 135.) Additionally, the Court notes the caption of Defendants’ motion to partially
 27 dismiss erroneously references the TAC, when the motion itself seeks to dismiss claims
 28 in the FAC. The Court construes the motion as moving to dismiss claims in the FAC.

⁴Plaintiffs’ opposition to Defendants’ motion was due on May 12, 2021. (ECF No.
 126.) When the deadline passed, Defendants filed a notice of Plaintiffs’ non-opposition
 to their motion, and Plaintiffs thereafter filed their untimely opposition that same day.

1 claim (ECF No. 132 at 3-4), the Court will therefore only address dismissal of Plaintiffs'
2 fraud claim.

3 Defendants argue that Plaintiffs' fraud claim should be dismissed under Rule
4 12(b)(6) because Plaintiffs have made no effort to allege facts evidencing Plaintiffs
5 suffered damages proximately caused by the fraud. (ECF No. 124 at 8-11.) Specifically,
6 Defendants argue the fraudulent actions that Plaintiffs allege occurred after the Love
7 Case settled, even as recently as 2016 to 2021, and that the damage suffered is not a
8 cognizable fraud damage. (*Id.* at 10.) Plaintiffs appear to counter that they sufficiently
9 allege the required "fraudulent half-truths" and "misleading statements" the Loves made
10 to Plaintiffs to cover up their "scheming." (ECF No. 132 at 9-12.) Plaintiffs point to both
11 Love's knowledge of Somer's conflict of interest and Love's suppression of this
12 knowledge, and Jacquelyne's fraudulent representation that Love's signatures on the
13 three Agreements were valid, as actions taken by Defendants that led to Plaintiffs'
14 damages. (*Id.* at 10.) Plaintiffs' arguments are unconvincing.

15 A court may dismiss a plaintiff's complaint for "failure to state a claim upon which
16 relief can be granted." Fed. R. Civ. P. 12(b)(6). A properly pleaded complaint must
17 provide "a short and plain statement of the claim showing that the pleader is entitled to
18 relief." Fed. R. Civ. P. 8(a)(2); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).
19 While Rule 8 does not require detailed factual allegations, it demands more than "labels
20 and conclusions" or a "formulaic recitation of the elements of a cause of action."
21 *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Twombly*, 550 U.S. at 555). "Factual
22 allegations must be enough to rise above the speculative level." *Twombly*, 550 U.S. at
23 555. Thus, to survive a motion to dismiss, a complaint must contain sufficient factual

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25 (ECF Nos. 130, 132). While *pro se* litigants are entitled to some latitude and leniency on
26 procedural matters, see *Perrotte v. Johnson*, Case No. 1:15-cv-00026-LJO-SAB (PC),
27 2017 WL 35499, at *3 (E.D. Cal., Jan. 3, 2017) (collecting cases), the Court cannot
28 ignore that Plaintiffs are both licensed attorneys who have elected to represent
themselves in this action. (See ECF No. 120 at 1, n.1.) Moreover, Plaintiffs' opposition
is silent on their untimely filing—thus offering no "excusable neglect" as provided in LR
IA 6-1(a). The Court warns Plaintiffs that further failure observe procedural rules will be
viewed unfavorably.

1 matter to “state a claim to relief that is plausible on its face.” *Iqbal*, 556 U.S. at 678
 2 (quoting *Twombly*, 550 U.S. at 570).

3 At issue is Plaintiffs’ fraud claim. As the Court stated in its previous order, the
 4 elements of fraud under California law⁵ are: “(1) misrepresentation, (2) knowledge of
 5 falsity, (3) intent to induce reliance, (4) justifiable reliance, and (5) damages.” *B. Braun*
 6 *Med., Inc. v. Rogers*, 163 F. App’x 500, 507 (9th Cir. 2006) (citing *Seeger v. Odell*, 18
 7 Cal. 2d 409, 414 (Cal. 1941)). “A successful fraud claim also requires a showing of
 8 proximate causation—i.e., ‘that damages were sustained as a proximate cause of the
 9 fraudulent conduct.’” *Ronpak, Inc. v Elecs. for Imaging, Inc.*, Case No. 14-cv-04058-
 10 JST, 2015 WL 179560, *2 (N.D. Cal. Jan. 14, 2015) (citing *B. Braun*, 163 Fed. App’x at
 11 507). Claims based on fraud fall within Rule 9(b)’s heightened pleading standard. See
 12 *id.* (citing *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1105 (9th Cir. 2003)).

13 In the Court’s previous order, the Court granted Plaintiffs leave to amend their
 14 fraud claim because they had failed to allege any damages proximately caused by the
 15 alleged fraud in the TAC. (ECF No. 120 at 15-16.) Additionally, the Court stated that “it
 16 remains unclear how Somer’s conflict of interest or the produced signatures were the
 17 proximate cause of Plaintiffs’ damages.” (*Id.* at 16.) The Court finds Plaintiffs’ revised
 18 fraud claim suffers from the same defects as before. It remains unclear to the Court how
 19 the Loves’ false representation of their knowledge of the conflict of interest was the
 20 proximate cause of Plaintiffs’ damages. The Court additionally finds that Plaintiffs have
 21 again failed to allege with specificities the elements of fraud. See *B. Braun Med., Inc.*,
 22 163 F. App’x at 507. Plaintiffs further fail to allege proximate causation in that their
 23 damages were the result of the conflict of interest being concealed and the result of
 24 Jacquelyne producing Love’s signatures. See *Ronpak, Inc.*, 2015 WL 179560, at *2.

25 Moreover, Rule 8(2) requires that pleadings must contain “a short and plain
 26 statement of the claim showing that the pleader is entitled to relief[.]” The Court, having

27
 28 ⁵The Court previously determined that California law should apply to Plaintiffs’
 fraud claim. (ECF No. 120 at 7-8.) As such, the Court applies California state law here.

1 reviewed the FAC, finds that Plaintiffs have ignored Rule 8(2). The allegations are
 2 difficult to follow and contain several run-on sentences throughout the 71-page FAC.
 3 While Plaintiffs' response points to the fraudulent actions being the conflict of interest
 4 and the false production of signatures, the FAC includes multiple other alleged
 5 fraudulent conduct or "pattern of fraud" within the first cause of action. (ECF No. 121 at
 6 53-62.) Notably, Plaintiffs state that Jacquelyne's "schemes began at least in 2003,"
 7 which raises confusion and doubt as to whether her alleged fraudulent actions began in
 8 the 1990s with the production of Love's signature. (*Id.* at 5 (internal quotes omitted).)
 9 This makes it difficult for the Court to decipher whether the claim is properly alleged,
 10 especially given the heightened pleading standards for fraud under Rule 9(b). See
 11 *Ronpak, Inc. v. Elecs. for Imaging, Inc.*, Case No. 14-cv-04058-JST, 2015 WL 179560,
 12 at *2 (N.D. Cal. Jan. 14, 2015) (citing *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1079,
 13 1105 (9th Cir. 2003)). As such, the Court finds that Plaintiffs have again failed to state a
 14 fraud claim, and dismissal is warranted under Rule 12(b)(6). For the reasons stated
 15 herein, Defendants' motion to partially dismissed the FAC is granted. Both Plaintiffs'
 16 fraud and fraudulent transfer claims are dismissed.

17 **B. Defendants' Motion to Strike⁶**

18 Citing Rules 12(f) and 15(a)(2), Defendants move to strike several parts of the
 19 FAC. (ECF No. 125.) This includes striking Plaintiffs': (1) references to the non-binding
 20 arbitration; (2) legal arguments that are not factual allegations; (3) attacks on
 21 Defendants' counsel, and (4) prayer for relief. (*Id.* at 13-17.) Because the Court
 22 disagrees with Defendants, the Court will first set forth the legal standard for Rule 12(f)
 23 motions. The Court will then discuss Defendants' misplaced reliance on Rule 15(a)(2),
 24 followed by why striking references to the non-binding arbitration and the other parts of
 25 the FAC are unwarranted.

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 27
 28 ⁶The Court has reviewed Plaintiffs' response and Defendants' reply. (ECF Nos. 132, 136.)

1 1. Legal Standard

2 Rule 12(f) allows the Court to “strike from a pleading an insufficient defense or
3 any redundant, immaterial, impertinent, or scandalous matter.” “Motions to strike are
4 generally regarded with disfavor.” *Roadhouse v. Las Vegas Metro. Police Dep’t*, 290
5 F.R.D. 535, 543 (D. Nev. 2013) (quoting *Mag Instrument, Inc. v. JS Prods., Inc.*, 595 F.
6 Supp. 2d 1102, 1106 (C.D. Cal. 2008)). The purpose of a motion to strike is to avoid
7 “the expenditure of time and money that must arise from litigating spurious issues by
8 dispensing with those issues prior to trial.” *Fantasy, Inc. v. Fogerty*, 984 F.2d 1524,
9 1527 (9th Cir. 1993), *rev’d on other grounds*, 510 U.S. 517 (1994) (quoting *Sidney-*
10 *Vinstein v. A.H. Robins Co.*, 697 F.2d 880, 885 (9th Cir. 1983)). “Given their disfavored
11 status, courts often require a showing of prejudice by the moving party before granting
12 the requested relief.” *Roadhouse*, 290 F.R.D. at 543 (quoting *Mag Instrument*, 595 F.
13 Supp. 2d at 1106)). “Whether to grant a motion to strike lies within the sound discretion
14 of the district court.” *Id.*

15 2. Rule 15(a)

16 Because the Court previously granted Plaintiffs leave to amend their dismissed
17 claims in its previous order, Defendants argue that several parts of the FAC should be
18 stricken because Plaintiffs have violated Rule 15(a). (ECF No. 125 at 13.) Despite
19 Plaintiffs’ silence in their opposition in addressing this argument, the Court nevertheless
20 finds Defendants’ argument unconvincing.

21 Rule 15(a) sets forth the rules governing amendments to pleadings. Subsection 2
22 states in pertinent part, that “a party may amend its pleading only with the opposing
23 party’s written consent or the court’s leave.” Fed. R. Civ. P. 15(a)(2). Defendants are
24 correct that the Court’s previous order gave Plaintiffs leave to amend their dismissed
25 claims “to the extent Plaintiffs are able to cure the deficiencies address” in that order.
26 (ECF No. 120 at 22.) However, the Court is disinclined to grant Defendants’ motion to
27 strike in its entirety under Rule 15(a) because Plaintiffs are not alleging new causes of
28 action outside those previously brought in their prior complaint. Although additional facts

are alleged and additional opinion statements are offered in the FAC, the Court finds that they do not rise to the level that warrant being stricken. Because motions to strike are generally disfavored and Defendants have failed to sufficiently show they would suffer prejudice were their motion be denied, *see Roadhouse*, 290 F.R.D. at 541, 543, the Court denies Defendants' motion to strike under Rule 15(a).

3. Non-Binding Arbitration

Defendants argue that Plaintiffs' mentioning of the non-binding arbitration and the arbitration award in the FAC should be stricken under Cal. Bus. & Prof. Code § 6204(e). (ECF No. 125 at 14-16.) Defendants further argue the arbitration proceedings were confidential, both parties rejected the arbitration award, and Plaintiffs' "falsities" have no bearing on claims before the Court. (*Id.*) Plaintiffs counter that motions to strike are heavily disfavored and that Defendants failed to cite to the full language of § 6204(e). (ECF No. 132 at 13-14.) Additionally, Plaintiffs argue the arbitration cannot be deemed confidential when Defendants included the arbitration award along with their notice of rejection, and did so without seeking to file it under seal. (*Id.* at 16.) The Court agrees with Plaintiffs.

Cal. Bus. & Prof. Code § 6204(e) states, "Except as provided in this section, the award and determinations of the arbitrators shall not be admissible nor operate as collateral estoppel or res judicata in any action or proceeding." A plain reading of this statute suggests that Plaintiffs' multiple references to the arbitration and arbitration award throughout the FAC, (see ECF No. 121 at 6, 9-12, 19, 21, 22, 33, 51-52), is inadmissible. However, the Court is perplexed that Defendants are seeking to strike references to the arbitration and the arbitration award—in part, arguing confidentiality—when in fact, Defendants have attached the award as an exhibit to their notice of rejection (see ECF No. 108-1 at 2-21). An examination of the award reveals a detailed recounting of the issues, background, testimonies, and the legal conclusion pertaining to the arbitration that Plaintiffs reference in their FAC. (*Id.*) If Defendants hold a genuine expectation of confidentiality, as they appear to suggest in citing to *Vedder Price P.C. v.*

1 *US Capital Partners, LLC*, then Defendants would have sought to seal the arbitration
 2 award as the party holding an expectation of confidentiality did in *Vedder Price P.C.*
 3 Case No. 16-CV-6787 (JPO), 2019 WL 1986737 at *1 (S.D.N.Y. May 6, 2019). But
 4 Defendants have not done so. As such, it would be incongruous for the Court to find
 5 Defendants have sufficiently shown they would suffer prejudice when much of the
 6 confidential information they seek to strike in the FAC already exist on their own accord
 7 when they filed the arbitration award without a request to seal. The Court thus declines
 8 to strike references to the arbitration and arbitration award in the FAC.

9 **4. Other Parts**

10 Defendants additionally move to strike from the FAC the legal arguments that are
 11 not factual allegations, attacks on defense counsel, and Plaintiffs' prayer for relief in
 12 paragraph 8 of the relief sought. (ECF No. 125 at 16-17.) Plaintiffs counter that motions
 13 to strike are an extreme remedy that are heavily disfavored. (ECF No. 132 at 12-13.)
 14 Plaintiffs additionally argue that Defendants offer no basis to support striking what
 15 Defendants characterize as legal arguments, and that Plaintiffs' allegations against
 16 defense counsel are material and pertinent to this action. (*Id.*) The Court agrees in part
 17 with Plaintiffs.

18 The Court finds the various parts Defendants seek to strike, again, do not
 19 warrant the "disfavored" act of striking these parts. *See Roadhouse*, 290 F.R.D. at 541.
 20 Nor does the Court again find that Defendants have shown these parts to be prejudicial
 21 if the Court did not strike them. *Id.* at 543. Accordingly, and for all the reasons stated
 22 above, the Court denies Defendants' motion to strike in its entirety.

23 **C. Plaintiffs' Motion to Strike⁷**

24 Plaintiffs move to strike Love's filing of his notice of rejection of the arbitration
 25 award and his request for a trial *de novo*. (ECF No. 122.) Citing to Cal. Bus. & Prof.
 26 Code § 6204(c), Plaintiffs argue that the non-binding arbitration between the parties

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 28 ⁷The Court has reviewed Defendants' response and Plaintiffs' reply. (ECF Nos. 123, 127.)

1 commenced on May 13, 2019, which was prior to Love being named a Defendant on
2 July 25, 2019, in this action. (*Id.* at 3.) Additionally, Plaintiffs argue that because the
3 parties have both filed actions in the San Diego Superior Court, Love's filing of his
4 rejection is therefore a "nullity" and does not transfer jurisdiction to this Court. (*Id.* at 3.)
5 Defendants counter that this action is the "action pending" as prescribed by § 6204(b) of
6 the Cal. Bus. & Prof. Code. (ECF No. 123 at 8.) And that, despite Plaintiffs' jurisdictional
7 contention, an "action pending" includes actions before federal courts. (*Id.* at 8-9.) The
8 Court agrees with Defendants.

9 Section 6204(b) of the Cal. Bus. & Prof. Code provides in pertinent part, "[i]f there
10 is an action pending, the trial after arbitration shall be initiated by filing a rejection of
11 arbitration award and request for trial after arbitration in that action within 30 days after
12 service of notice of the award." Here, the arbitration panel of the SDCBA issued the
13 arbitration award on February 1, 2021. (ECF No. 108-1 at 2-21.) Love rejected this and
14 proceeded, on March 3, 2021, to file a notice of his rejection in this action, which was
15 filed in May 2019. (ECF No. 108.) Based on a plain reading of § 6204(b), the Court finds
16 that Love properly complied with the statute.

17 While the Court recognizes that Love was not named in the original complaint,
18 and that he became a defendant in this action after arbitration in California commenced,
19 Love has nevertheless been a party in this action well before the arbitration award was
20 issued. Without convincing authority to persuade it otherwise, the Court declines to
21 interpret "action pending" within § 6204 to require an existing action between the parties
22 prior to arbitration commencing instead of when a final determination is rendered.
23 Moreover, Plaintiffs provide no legal basis to support their argument that because the
24 parties commenced actions in San Diego Superior Court, those actions null Defendants'
25 notice of rejection. Nor is the Court convinced, in light of existing caselaw, that "action
26 pending" excludes federal actions. See *Vedder Price P.C.*, 2019 WL 1986737 at *1
27 (explaining that the parties resumed their federal action after arbitration proceedings in
28 California had ended, and the parties rejected the arbitration outcome); *Herbold v.*

1 *Millard*, Case No. CV 02-01639 DDP (PJWx), 2004 U.S. Dist. LEXIS 31243, at *4-*5
 2 (C.D. Cal. Aug. 5, 2004) (recounting that federal action resumed after plaintiff rejected
 3 arbitration decision following non-binding arbitration proceedings before Los Angeles
 4 County Bar Association). Accordingly, Plaintiffs’ motion to strike is denied.

5 **D. Plaintiffs’ Motion for Speedy Hearing⁸**

6 Plaintiffs move under Rule 57 for a speedy hearing on their seventh cause of
 7 action—declaratory judgment. (ECF No. 143.) Plaintiffs argue that the binding effect and
 8 enforceability of the 1992 Agreement is straightforward, simple, and will narrow the
 9 issues in this action for trial. (*Id.*) Defendants counter that the issue pertaining to the
 10 enforceability of the 1992 Agreement has already been before the Court. (ECF No.
 11 144.) Defendants also argue the declaratory judgment claim remains dependent on
 12 whether the 1992 Agreement was fully executed, which remains a disputed fact. (*Id.* at
 13 11-13.) The Court agrees with Defendants.

14 Plaintiffs had previously filed a motion for summary judgment on their declaratory
 15 judgment claim in their TAC, arguing there was no genuine issue of material fact
 16 regarding the validity of the 1992 Agreement. (ECF No. 51.) The Court found that “[a]
 17 rational trier of fact could reasonably find there was no agreement,” thus a “genuine
 18 issue of material fact exists as to the fully executed Agreement.” (ECF No. 120 at 10-
 19 14.) As such, a hearing pursuant to Rule 57 would not resolve the factual dispute
 20 pertaining to the validity of the 1992 Agreement and would merely rehash arguments
 21 already addressed by the Court. Disputed facts remain for a jury to resolve. Plaintiffs’
 22 motion for a speedy hearing is therefore denied.

23 **IV. CONCLUSION**

24 The Court notes that the parties made several arguments and cited to several
 25 cases not discussed above. The Court has reviewed these arguments and cases and
 26

27
 28 ⁸The Court has reviewed Defendants’ response and Plaintiffs’ reply. (ECF Nos. 144, 149.)

1 determines that they do not warrant discussion as they do not affect the outcome of
2 motions before the Court.

3 It is therefore ordered that Defendants' motion to partially dismiss (ECF No. 124)
4 claims in the FAC is granted. Plaintiffs' fraud and fraudulent transfer claims in the FAC
5 are dismissed.

6 It is further ordered that Defendants' motion to strike (ECF No. 125) is denied.

7 It is further ordered that Plaintiffs' motion to strike (ECF No. 122) is denied.

8 It is further ordered that Plaintiffs' motion for a speedy hearing (ECF No. 143) is
9 denied.

10 DATED THIS 23rd Day of February 2022.

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15 _____
16 MIRANDA M. DU
17 CHIEF UNITED STATES DISTRICT JUDGE
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